**CHIEW PUTT KOO @ SUNNY (TRADING AS CONTAINER PACKING & MOVING)**

**v.**

**CHEONG WING CHAN SDN. BHD.**

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[CIVIL APPEAL NO. R1-12-264-92]
23 AUGUST 1994

***PRACTICE & PROCEDURE: Appeal against dismissal of application to set aside judgment in default - Service of summons by posting on notice board of Court and at appellant's premises - Respondent aware appellant shifted premises - Whether service effective - Whether respondent's claim to vacant possession maintainable - Whether any merits to the appellant's defence.***

This was an appeal against the dismissal of the appellant's application to set aside a judgment in default of appearance.

Service of the summons was effected on the appellant by way of substituted service i.e. by posting a copy of the summons on the notice board of the Court and another copy on the appellant's premises as the process server had been informed that the appellant had shifted with whereabouts unknown. A letter of appointment to effect service had been sent to the appellant which receipt was acknowledged on the AR card. The appellant questioned whether there was sufficient notice given to him of the proceedings against him. The appellant also questioned the right of the respondent to claim vacant possession as he had already vacated the premises by the end of January and handed the keys to the respondent's caretaker, an Indian gentlemen. However, an employee of the respondent denied receiving any keys from the appellant.

**Held:**

**[1]** The Court considered such postings to be inadequate to bring the proceedings to the notice of the appellant, particularly when the respondent was fully aware that the appellant had already shifted from his premises and his whereabouts were unknown. There should at least have been an advertisement in the local papers. In the absence of such advertisement, service of the summons had not been effectively made. Whilst there was a signature on the AR card, a comparison of it with the signature of the appellant appearing in the affidavits filed showed a marked difference. In the light of such apparent discrepancy the Court still considered that the summons had not been effectively served on the appellant.

**[2]** It was uncertain whether the employee of the respondent was the caretaker and the only Indian employed by the respondent. In view of such affidavit evidence, only oral evidence could testify whether the respondent was entitled to vacant possession. Thus, the appellant had shown there were merits in his defence.

*[Appeal allowed with costs].*

*For the appellant - Devinder Singh; M/s. Isherafer Ali Devinder & Associates*
*For the respondent - Somaskanthan; M/s. Shook Lin & Bok*

**JUDGMENT**

**Siti Norma Bte Yaakob J:**

Judgment in default of appearance had been entered against the appellant, the defendant in the original suit in the Sessions Court, on 11 March 1988. His application to have the judgment set aside was dismissed with costs. Hence this appeal.

Two issues were raised by the appellant:

(1) whether there was sufficient notice given to him of the proceedings against him.

(2) whether the plaintiff's claim for vacant possession can be maintained against him.

Service of the summons was effected on the appellant by way of substituted service. An affidavit from the process server confirms that he was unable to locate the appellant at the appellant's premises, which he found locked. He was informed by persons adjacent to appellant's office that the appellant had shifted but his whereabouts were not known. Based on this affidavit, the respondent obtained an order to have the summons served by posting a copy on the notice board of the Sessions Court and another copy on the appellant's premises.

I consider such postings to be inadequate to bring the proceedings to the notice of the appellant, particularly when the respondent was fully aware that the appellant had already shifted from his premises and his whereabouts were unknown. There should at least be an advertisement in the local papers and in the absence of such an advertisement, I consider that service of the summons has not been effectively made.

The respondent, however, rely on the fact that a letter of appointment to effect service had been sent to the appellant and he had acknowledged receipt of that letter on the AR card.

Whilst there is a signature on the AR card, a comparison of it with the signature of the appellant appearing in the affidavits he has filed, shows a marked difference and in the light of such apparent discrepancy, I still consider that the summons had not been effectively served on the appellant.

Apart from the service of the summons, the appellant has also questioned the right of the respondent to claim vacant possession as he had already vacated the premises by the end of January 1985 by handing the keys of the premises to the respondent's caretaker, an Indian gentleman. This handing over was witnessed by another tenant of the same building, one Jaswant Singh.

One Vasuthevan a/l Raman, an employee of the respondent, denies receiving any keys from the appellant but it is not very certain whether he was the respondent's caretaker and the only Indian employed by the respondent. In the light of such affidavit evidence, I consider that only oral evidence can testify whether the respondent is entitled to vacant possession. This seems more so when, at the time of trying to effect personal service, the respondent became fully aware that the appellant was no longer at the premises.

In the light of such evidence and on my finding that service of the summons has not been effectively made, I consider that the appellant has shown that there are merits to his defence, and on that finding I had allowed the appellant's appeal with costs.